

# PROTEST

**PROTEST FEE PAID**

**\$15.00 18-01614**

Fee Rec'd BY: ONLINE

April 4, 2018

Protestant: Western Resource Advocates  
c/o Ariel Calmes, Esq.  
150 S 600 E Ste. 2A  
Salt Lake City, UT 84102

**RECEIVED**  
**APR 04 2018**  
**WATER RIGHTS**  
**ONLINE**

RE: Protest of Water Right Application 41-3747

A hearing is requested.

## INTRODUCTION

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Western Resource Advocates respectfully protests this Export Application (A81080, water right 41-3747), filed by Water Horse Resources, LLC, and currently pending before the Utah State Engineer. This protest is timely filed, pursuant to published notices in the instant administrative record. WRA respectfully requests that the State Engineer deny the Export Application. Western Resource Advocates' reasons justifying denial of the Export Application are as follows:

### A. Interests of Protesting Party

Western Resource Advocates ("WRA") is a nonprofit conservation organization dedicated to protecting the Interior West's land, air, and water. WRA has been a part of the Utah community for over twenty years. We promote river restoration and water conservation, advocate for a clean and sustainable energy future, and protect public lands for present and future generations. WRA members live, work, and recreate- in the vicinity of the proposed Flaming Gorge Pipeline, including on the lands and waters that would be affected by the Flaming Gorge Pipeline. WRA has invested many staff hours studying and advocating for protection of public lands and water resources in the Green River Basin.

For example, WRA is a long-time member of the Upper Colorado River Endangered Fish Recovery Program ("Recovery Program"). The Recovery Program is a collaborative effort with members from states including Utah and Colorado, many federal agencies, and representatives from water users and conservation groups. For 30 years, the Recovery Program has worked to recover four species of endangered warm-water fish (Colorado pikeminnow, humpback chub, bonytail, and razorback sucker) and to avoid a more severe application of the Endangered Species Act ("ESA"). The Green River downstream of Flaming Gorge Reservoir is critical habitat for the recovery of these species basin-wide.

### B. Factual Background

#### 1. The Green River and its values

**SCANNED**

The Green River downstream of Flaming Gorge Dam provides numerous important riparian and wetland habitat values. The Bureau of Reclamation divides the Green River below Flaming Gorge Dam into three reaches:

- \* Reach 1 starts just below the dam and ends in Dinosaur National Monument at the confluence with the Yampa River in Colorado.
- \* Reach 2 starts at the Green River's confluence with the Yampa River and ends at the confluence with the White River in Utah.
- \* Reach 3 starts at the confluence with the White River and ends at the confluence with the Colorado River in Canyonlands National Park.

Bureau of Reclamation, Operation of Flaming Gorge Dam Final Environmental Impact Statement 64-67 (Sept. 2005), attached as Exh. A. In addition to providing water for Dinosaur National Monument, Reaches 1 and 2 of the Green River also provide important wetlands and riparian habitat in Browns Park and Ouray national wildlife refuges, as well as the State of Utah's Stewart Lake Wildlife Refuge. Notably, the Green River provides habitat for the four federally listed native fish species in the Green River: the Colorado pikeminnow, humpback chub, razorback sucker, and bonytail. Reaches 2 and 3 contain designated critical habitat for all four of these species. *Id.* at 70-72.

The Green River and Flaming Gorge Reservoir also provide world-class natural and recreational opportunities to tens of thousands of visitors each year. Flaming Gorge National Recreation Area encompasses the reservoir and provides fishing, boating, and other water sports opportunities. According to the Bureau of Reclamation, approximately 80% of the visits to Flaming Gorge reservoir are connected to water-based recreational activities. Downstream of Flaming Gorge Dam, water-based recreation represents "virtually all" visits to the Green River. *Id.* at 110. In 2005, the Bureau estimated that the Green River in the Flaming Gorge National Recreation Area attracts over 92,000 visits per year, and the reservoir attracts over 664,000 visits per year. *Id.* at 112.

Importantly, the Green River, including water stored in Flaming Gorge Reservoir, helps ensure that the states of Colorado, New Mexico, Utah, and Wyoming meet their water delivery obligations to downstream states, delivered at Lee Ferry, Arizona, under the 1922 Colorado River Compact. See Colorado River Storage Project Act ("CRSPA"), 43 U.S.C. [F] 620, et seq. (authorizing construction of Flaming Gorge Dam and Reservoir).

## 2. History of Aaron Million's Flaming Gorge Pipeline Project

This Export Application (A81080, water right 41-3747) before the Utah State Engineer is the latest episode in Aaron Million's multi-year effort to profit off of the private sale of Green River water proposed for use in Colorado's Front Range communities. The pipeline concept has varied somewhat over the years, but all versions involve pumping substantial quantities of water from the Green River in Utah or Wyoming along a roughly 500-mile route east along the I-80 corridor and then south into the Front Range.

Although Mr. Million now acts as the principal of Water Horse Resources, LLC ("Water Horse"), over the last decade he has also been, under at least two other corporate monikers - Million Conservation Resource Group, and Wyco Water & Power, Inc. - behind unsuccessful attempts to secure permits for his proposed pipeline from the Army Corps of Engineers, the Federal Energy Regulatory Commission, and the Wyoming State Engineer.

- i. The U.S. Army Corps of Engineers' withdrawal of a dredge and fill permit application under the Clean Water Act.

In 2008, Water Horse's first predecessor in interest, Million Conservation Resource Group ("MCRG"), applied to the U.S. Army Corps of Engineers ("Corps"), Omaha District for a Section 404 Permit under the Clean Water Act for its proposed "Regional Watershed Supply Project ("RWSP"). The RWSP proposed to pump approximately 250,000 AF of water per year from Flaming Gorge Reservoir and the Green River in Wyoming to southeastern Wyoming and Colorado's Front Range. The Corps held scoping meetings for the RWSP in communities in Colorado, Utah, and Wyoming in 2009. See 74 Fed. Reg. 11920 (Mar. 20, 2009).

During scoping, MCRG's application faced stiff opposition from local communities and the state of Wyoming. Numerous county governments and county organizations in Utah, Wyoming, and Colorado expressed their strong opposition to, or deep concern with, the proposed pipeline project. Exh. N (county governments' scoping comments). Wyoming Governor Dave Freudenthal also raised a number of threats to Wyoming's water users and recreation economy, and concluded with an unambiguous statement of opposition to the pipeline project. Exh. M at 1-5.

After conducting initial scoping in 2009, the Corps requested additional info from MCRG regarding the Pipeline's purpose and need, including the potential users of the Pipeline's water. MCRG responded by providing the Corps with several "letters of interest" from agricultural and municipal water users. These letters lacked any firm commitment for use of water or any reflection of cost or willingness to pay. Letter from Andrew L. Spielman, counsel for Million Conservation Resource Group, to Tim Carey, Chief, Omaha District, U.S. Army Corps of Engineers (Jan. 20, 2010) (presenting so-called "letters of interest" to the Corps), attached as Exh. B.

In a July 14, 2011, letter from the Corps to Aaron Million, President of MCRG, the Corps terminated the Environmental Impact Statement ("EIS") process for Million's Section 404 application. Letter from Kathryn Schenk, Chief, Operations Division, Omaha District, U.S. Army Corps of Engineers, to Aaron Million, President, Million Conservation Resource, attached as Exh. C. The letter cited several delays caused by MCRG and incomplete answers provided by MCRG to the Corps' requests. Specifically, the letter notes:

\* MCRG submitted an unexplained 60- to 90-day "stop-work request" on May 21, 2010. The Corps granted the request but MCRG did not contact the Corps for more than 90 days after the request. MCRC subsequently caused further delays preventing resumption of work until January 17, 2011 - totaling a 241-day delay.

\* MCRG submitted a second 60-day "stop-work request" on April 27, 2011. MCRG claimed that it needed this delay in order to explore changing the claimed project purpose from water supply to electrical power. MCRG informally requested another 30-day extension on July 1, 2011. Soon thereafter, the Corps issued its July 14 letter terminating the RWSP EIS process.

In explaining its decision to terminate the EIS process, the Corps stated:

Since the start of the EIS process, the Corps has spent much time dealing with delays on the part of MCRG. As per regulations, the Corps has designated a single staff person to orchestrate a multitude of tasks and we simply cannot continue to devote staff resources to a project with an uncertain and variable project purpose.

Exh. C at 2. With respect to MCRG's numerous delays and requests for extensions of time, the Corps simply stated, "[w]e have been more than accommodating in that regard." Id.

ii. Federal Energy Regulatory Commission's ("FERC") rejection of a preliminary permit under the Federal Power Act.

On September 1, 2011, Aaron Million, now President of the newly-formed Wyco Power and Water, Inc. ("Wyco"), filed a preliminary permit application for the RWSP to FERC under Section 4(f) of the Federal Power Act. Wyco proposed substantially the same water supply project that he proposed to the Corps, but he added two pumped storage units along the RWSP route, as well as five in-conduit hydropower units. As described by FERC, Wyco's application provided little detail beyond "maps with a single line drawn from the water supply pipeline's two proposed water withdrawal locations to its terminus near Pueblo[, Colorado]." Wyco Power & Water, Inc., 138 FERC P.62,150 at 2 (Feb. 23, 2012), attached as Exh. D.

Like MCRG's application to the Corps, Wyco's application to FERC again encountered strong local opposition. In a December 16, 2011 letter to FERC, Wyoming Governor Matt Mead reiterated his state's unease with the proposed pipeline project. He stated:

"Lost recreational opportunities, jeopardized recovery programs for endangered species, electricity consumption exceeding electricity generation, environmental and legal issues surrounding the Green River, Colorado River and the Upper Colorado River Compact - all require full consideration. . . . This project would cut a vast swath across southern Wyoming, with the potential for huge impacts in many sectors of our economy and aspects of critical resources to Wyoming and Colorado. I appreciate your consideration of my comments and recognition of the depth of my concerns."

Exh. O at 3.

On February 23, 2012, Commission staff dismissed Wyco's preliminary permit application as premature. 138 FERC P.62,150 at 3 (Project No. 14263-000). FERC found that the project as proposed was, as a whole, too vague and uncertain to adequately study the proposed hydroelectric elements of the project within the three-year term of a preliminary permit. Wyco subsequently sought rehearing and clarification of FERC's order. Wyco Power & Water, Inc., 139 FERC P.31,124 at 3 (May 17, 2012), attached as Exh. E.

On May 17, 2012, FERC upheld its earlier denial of a preliminary permit application for the RWSP. 139 FERC P.31,124 at 1. Among several other reasons for its denial, FERC noted Wyco's stated intent to "reserve" all of "the available unused portions of water in the Green River from the States of Colorado and Wyoming[.]" Id. at 7. FERC responded that to accomplish this, "Wyco would have to independently obtain the water rights to divert flows from the Green River." Id.

FERC's May 17, 2012 Order also addressed Wyco's contention that it needed to secure a permit in order to attract financing for its project. Id. at 8. FERC noted that such financing was "presumably . . . for the water conveyance pipeline." Id. FERC rejected this argument noting that "a developer's desire to obtain financing is not by itself a substantial countervailing consideration." Id.

iii. The Wyoming State Engineer's rejection of a water right for the Flaming Gorge Pipeline.

In 2015, the Wyoming State Engineer rejected a similar water rights application filed by MCRC. See Exh. F (Wyo. State Engr.'s website summary of application SW1-1205). The primary differences between the Wyoming application and the instant Export Application are the different points of diversion in southwestern Wyoming and an even larger planned volume of water withdrawal from the Green River. See id. Pat Tyrell, the Wyoming State Engineer, justified the rejection based upon a lack of sufficient information to grant a water right. Ben Neary, Assoc. Press, Wyoming State Engineer Rejects Permits for Pipeline to Draw from Green River for Colorado, Casper Star Tribune, June 8, 2015, attached as Exh. G. According to Tyrell, "we rejected that application [because] we've been seeking additional information, that ultimately in our view didn't come[.]" Id.

Later in 2015, MCRG subsequently reapplied for substantially the same water right in Wyoming. Exh. H (Wyo. State Engr.'s website summary of application SW1-1810). There, as here, the applicant seeks a priority against Colorado's water users. Id. However, the application is currently under a "staff hold" and does not appear to be moving forward. See id.

Water Horse filed the instant Export Application with the Utah State Engineer in January, 2018.

## ARGUMENT

### I. On its Face, the Export Application Violates Utah's Anti-Speculation Doctrine; Therefore, It Must be Rejected.

The Utah State Engineer has a duty to reject speculative applications to export water. Under Utah's anti-speculation doctrine, to approve an export application, the State Engineer must find that there is "reason to believe that . . . the application was filed in good faith and not for purposes of speculation or monopoly." U.C. SS 73-3-8(1)(a)(v). If the State Engineer does not find such reason, the application must be denied. *Id.* at SS 73-3-8(1)(c). The Utah Code applies the anti-speculation doctrine, and all other relevant requirements under U.C. section 73-3-8, to water exports through its water export statute, section 73-3a-108(1)(b)(i)(A), and (3). "Although the legislature has given formal expression to [the anti-speculation doctrine], the principle would be equally true in the absence of statute." *Frailey v. McGarry*, 211 P.2d 840, 847 (Utah 1948).

In *Western Water, LLC v. Olds*, the Utah Supreme Court affirmed the State Engineer's denial of three related applications to appropriate water, based in part on the application of Utah's anti-speculation doctrine. 184 P.3d 578, 581, 586 (2008), discussed in *HEAL Utah v. Kane County Water Cons. Dist.*, 378 P.3d 1246, 1260-61 (Utah App. 2016). There, a private company sought to "salvage and exchange" hundreds of thousands of acre-feet of water with the goal of selling about 86,000 acre feet to unidentified users. *Id.* at 581-82. The State Engineer characterized this plan as "grandiose and highly speculative" and found that, among other failings, the application was for "speculation and monopoly because the only proposed beneficial use for the water was a plan to sell it to others." *Id.* at 583.

Here, analogously, Water Horse admits in its Export Application that it currently lacks a specific plan and intent for the consumptive use of any of 55,000 acre feet of water that it seeks to pump out of Utah and into Colorado. Paragraph 10 of the Application answers "TBD," meaning 'to be determined,' as its answer to its planned uses for all its claimed purposes, save the incidental in-line hydroelectric facilities that it plans to construct at undetermined locations along the pipeline route. Export App. Attachment A at 1. Similarly, Water Horse does not supply this information in its attachments. In other words, Water Horse admits that as of January 2, 2018 - the day it signed the instant Export Application - it did not know with specificity who will use this water, where in Colorado's Front Range it might be used, or for what specific beneficial uses. See Exp. App. at P. 9 (claiming every listed use, including "Other"), Attachment A at 15 (map showing the place of use as part or all of 47 townships in Colorado - a township is 36 square miles). Although determining speculative or monopolistic intent is usually a fact-intensive inquiry, see *HEAL Utah*, 378 P.3d at 1258, Water Horse's admission that it does not currently have a specific plan and intent to place this water to specific beneficial uses obviates any need for further investigation, and justifies rejection of the Export Application on its face.

Rejection of the Export Application would be consistent with the Utah Supreme Court's analysis in *Western Water*. There, as here, an application seeks an "immense" amount of water with no identifiable end users or specific proposed beneficial uses for any, much less all, of the tens of thousands of acre-feet sought in the application. See 184 P.3d at 582, 586. Water Horse's admission that it does not currently have a specific plan and intent for the water shows only a speculative "plan to sell it to

others." See *id.* at 583.

Furthermore, the instant case is readily distinguishable from *HEAL Utah*. There, the court affirmed the approval of two change applications to support a proposed nuclear power plant on the Green River. 378 P.3d at 1248-49. The court affirmed the lower court's holding that there was reason to believe that the applications were submitted in good faith and not speculative because there were contracts in place with a specific user, Blue Castle Holdings, for a specific plan and purpose: supplying water for a proposed nuclear power plant at Green River, Utah. By contrast, the Water Horse admits that it does not have a specific plan for a specific beneficial use. *Exp. App.* at P. 10. Water Horse does not seek to supply water to one project, or even one entity, but instead apparently seeks to market this water across a vast area of central, northern, and northeastern Colorado, including parts of ten different counties. WRA Exh. I (Earthjustice's GIS map of Place of Use claimed in *Exp. App.* Att. A). The Export Application is speculative under Utah law.

Finally, authority regarding Colorado's anti-speculation doctrine is particularly persuasive and relevant in the context of an application to export water to Colorado. In Colorado, it is well-established that where a private entity seeks a water right that is not for its own use, the applicant needs firm contractual commitments or an agency relationship with end-users. See, e.g., C.R.S. SS 37-92-103(3)(a); *Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566, 568 (Colo. 1979). The rule against speculation has its roots in Article XVI, Section 6, of Colorado's Constitution, and ensures that the state's scarce water resources are available to those with an actual need for the water by discouraging speculative water hoarding. See *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 662 (Colo. 2011) ("[Colorado's] constitution guarantees a right to appropriate, not a right to speculate."); *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307, 312 (Colo. 2007).

The Colorado Supreme Court has consistently upheld water court decisions rejecting applications that violate this basic requirement. In *High Plains A&M v. Southeastern Colorado Water Conservancy District*, 120 P.3d 710, 721 (Colo. 2005), the court affirmed that a private applicant's proposed transbasin diversion of water for "use in any number of Front Range locations for any number of purposes" was speculative. There, as here, the applicant failed to specifically identify any particular committed consumptive-user or parcels of private land where consumptive use will occur. *Id.* Colorado law broadly prohibits the hoarding of water rights for speculative sale. In all controlling respects, the facts of *High Plains* demonstrate that Water Horse's scheme for hoarding water for speculative future sale would be found illegal by Colorado's water courts. In this specific context, the Utah State Engineer should also look to Colorado's relevant case law for guidance and deny the Export Application as speculative.

## II. The Utah State Engineer Lacks Jurisdiction to grant- a Priority Enforceable Against Colorado Water Users.

Perhaps recognizing that Colorado's water courts would not grant- a water right decree to a patently speculative application to appropriate water, Water Horse instead asks the Utah State Engineer for "a priority date which will be relied upon for the purposes of water right administration, as and against all water rights making beneficial use of water allocated and appropriated to the state of Colorado." *Exp. App.* Attachment A at 2. As shown above, throughout the the history of the Flaming Gorge Pipeline project, Mr. Million, though his various corporate facades, has approached numerous alternative state and federal forums that he thinks might allow him to hoard Green River water for speculative sale in Colorado. The Utah State Engineer should deny this part of Water

Horse's request for relief for lack of jurisdiction.

a. The Utah State Engineer only has jurisdiction over the waters of the state of Utah.

The Utah Code grants the State Engineer broad "responsibl[ity] for the general administrative supervision of the waters of the state and the measurement, appropriation, apportionment, and distribution of those waters" as well as to "secure the equitable apportionment and distribution of the water according to the respective rights of appropriators." U.C. SS 73-2-1(3). However, this grant- of authority is limited to "waters of the state," i.e., waters of the state of Utah. Nothing in the Division of Water Resources enabling statute authorizes the State Engineer to issue water rights with a priority enforceable against Colorado's, or any other state's, in-state water users.

Instead, the Utah Code's clear intent is to promote harmonious administration of Utah's waters as they relate to interstate compacts and principles of equitable apportionment between states. U.C. SSSS 73-2-1(3)(b) (enabling statute), 73-3a-101 to -109 (water export statute); *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 619 (2013) (in the absence of a compact, conflicts over instate allocations of water are "subject to equitable apportionment by the courts"). Thus, under certain circumstances Utah law provides a mechanism for recognition of water exports and administration of that export within Utah's priority system. U.C. SSSS 73-3a-101 to -109. However, nothing in the Code authorizes the Utah State Engineer to grant- a priority that must be recognized by the Colorado State Engineer in his in-state administration of Colorado's water users.

b. Administration in Colorado against decreed Colorado users requires a Colorado water right.

In Colorado, the district engineers have a duty to curtail junior diversions required by senior water rights, where such diversions are causing or will cause injury to the senior water right. C.R.S. SS 37-92-502(2)(a). However, this duty only applies where the senior is properly decreed pursuant to Colorado law. C.R.S. SS 37-92-301(3) ("In the distribution of water, the division engineer in each division and the state engineer shall be governed by . . . the priorities for water rights and conditional water rights determined pursuant to the provisions of this article. All such priorities shall take precedence in their appropriate order over other diversions of waters of the state."); see also *V Bar Ranch LLC v. Cotten*, 233 P.3d 1200, 1208 (Colo. 2010) ("[A] water right owner is not entitled to have his or her water right administered within the priority system until he or she obtains a judicial decree confirming the water right."). The language of C.R.S. section 37-92-301 lends virtually no support for the notion that the Colorado State Engineer must follow another states' administrative permit approving use of Colorado's water in Colorado. Indeed, it explicitly commands curtailment of all undecreed diversions in the event of a call. Therefore, the Utah State Engineer lacks the authority or jurisdiction to grant- Water Horse's requested relief with respect to granting a priority within Colorado's prior appropriation system.

III. Water Horse is Not Entitled to Protection Under Article IX(a) of the Upper Colorado River Compact.



The Export Application's reliance upon the Colorado River Compact of 1922 and the Upper Colorado River Compact of 1948 is misplaced. Under certain circumstances, Article IX(a) of the Upper Colorado River Compact of 1948 provides some protection to bona fide water users in "lower" (downstream) signatory states against anti-water export laws in "upper" (upstream) signatory states. However, as thoroughly described in Part I, above, Water Horse's Export Application is speculative. By its own admission, Water Horse does not at this time claim to stand in the shoes of any legitimate Colorado water user with a specific plan and intent to apply water to actual beneficial use. In addition, we agree with the Utah Board of Water Resources (UBWRes) and the Utah Division of Water Resources (UDWRes) that there is no evidence in the Export Application or the administrative record to date showing that Water Horse stands in the shoes of Colorado's state government, or any bona fide Colorado water user. See also UBWRes & UDWRes Subst. & Amd. Protest of Water Right App. 41-3747 (Apr. 2, 2018).

The Upper Colorado River Compact is an interstate agreement by and for the States of the Upper Division, including the states of Utah and Colorado. It would be absurd for Water Horse to argue that the Compact's signatories intended Article IX(a) to create a loophole excluding speculators from each state's long-standing anti-speculation and beneficial use doctrines. Water Horse cannot use Article IX(a) as a shield against the laws of both Utah and Colorado.

#### IV. Mandatory Investigation

As stated above, Water Horse's admission that it has not yet determined the purpose and extent of the planned use of these water rights justifies, by itself, rejection of the Export Application. Accordingly, there is sufficient basis currently in the administrative record to reject the application at this time. Cf. *Western Water*, 184 P.3d at 586 (it is not the State Engineer's duty to meet the applicant's burden of proof under U.C. SS 73-3-8). Because this admission is conclusive as to the Export Application's lack of merit, rejection on this ground satisfies U.C. section 73-3a-108(1)(a), which requires an investigation into export applications.

Nonetheless, should the State Engineer, under U.C. section 73-3a-108(1)(a), elect to conduct further investigations before rendering a decision, see U.A.C. R.655-6-7, a detailed investigation into the project and its potential impacts will similarly lead to a rejection of the Export Application for the reasons including, but not necessarily limited to, the following:

- a. The proposed project is speculative (U.C. SS 73-3-8(1)(a)(v); U.C. SS 73-3a-108(1)(b)(ii)).

The State Engineer must require proof of firm contractual commitments from all of Water Horse's end users. Such contracts must be fully binding upon the end user, including a commitment regarding a price for water that is reasonable in light of the overall project cost and the cost of alternative water supplies. See *Heal Utah*, 378 P.3d at 1261. Cumulatively, these contracts must represent the entire volume of water claimed in the application, or at least that portion of water not intended for Water Horse's own consumptive use. See *id.* The State Engineer should also demand proof that all of the claimed 55,000 acre-feet of water is actually needed to meet specific beneficial uses in Colorado, and that other supplies not available. See U.C. SS 73-3a-108(2)(e). Finally, the State Engineer should demand proof that the planned uses are "clearly defined," like the nuclear power plant in *Heal*

Utah, 378 P.3d at 1261, and do not merely rest upon broad regional estimates of a potential future water supply gap, as was the case in *Western Water*, 184 P.3d at 583 (an application for water is speculative where it only amounts to a plan to "sell it to others").

b. The proposed project lacks available water (U.C. SS 73-3-8(1)(a)(i); U.C. SS 73-3a-108(2)(a) to (2)(d)).

There does not appear to be available water for a water export at this location in light of the environmental flow targets for the Upper Colorado River Endangered Fish Recovery Program. See U. Colo. R. Endangered Fish Recovery Prog., Flow & Temp. Recs. for Endangered Fishes in the Green River Downstream of Flaming Gorge Dam (Sept. 2000), attached as Exh. P. Therefore, it is unlikely that Water Horse could obtain such a contract under current operations at Flaming Gorge Reservoir.

c. The proposed project would unreasonably affect public recreation, the natural stream environment, and public welfare (U.C. SS 73-3-8(1)(a)(iii)(B), (1)(b); U.C. SS 73-3a-108(1)(b)(i)(C)).

Due to a lack of available water, the proposed pipeline would unreasonably affect flows needed for native fish, recreational fishing, recreational boating, and tourism in eastern Utah. These concerns include, but are not limited to, river flows through Browns Park National Wildlife Refuge, Dinosaur National Monument, and Canyonlands National Park, as well as meeting the U.S. Fish & Wildlife Service flow recommendations in the Green River, see Exh. P, ushered in through the 2005 Operation of Flaming Gorge Dam Final Environmental Impact Statement. Another important consideration is that the Green River at, and for many miles downstream of, the proposed points of diversion includes a segment of river that is designated as "eligible" for inclusion in the National Wild and Scenic Rivers System. Dept. of Interior, Wild & Scenic River Study Envtl. Stmt.: Green & Yampa Rivers (July, 1980), attached as Exh. J. This eligible segment of the river includes outstanding natural value designations of "scenic" and "wild." *Id.* at xiii. The State Engineer would be justified rejecting the Export Application on these grounds.

d. The proposed project would unreasonably interfere with the more beneficial use of water (U.C. SS 73-3-8(1)(a)(ii), (1)(b)), and lacks consistency with Utah's reasonable water conservation policies or objectives (U.C. SS 73-3a-108(1)(b)(i)(B), (1)(b)(i)(D), (2)).

In light of the fact that the Green River is a fully appropriated basin, it appears that approval of the Export Application would interfere with the more beneficial use of water in Utah. As an original appropriation, it appears that existing Utah policy would strongly disfavor a comparable in-state application for 55,000 acre-feet from the Green River. In 1990, the Division of Water Rights recognized the fully appropriated status of the Colorado River basin, including the Green River, by adopting a policy generally limiting applications to permanently appropriate water to small applications approximating the needs of, one family, one acre of irrigation and 10 "equivalent livestock units." Memo. from Robert Morgan, DWR, to DWR Staff, Memo. of Water Approp. Policy Colo. R. Drainage (Mar. 7, 1990, rev'd Feb. 25, 2009), available at <https://www.waterrights.utah.gov/wrinfo/policy/wrareas/colorado.asp>. The memo states that larger appropriations "may be considered for perpetual approval," but for such applications the proposed depletion must be "defined." *Id.*

Although this policy does not expressly apply to export applications, the State Engineer should evaluate Water Horse's Export Application in light of the important interests that this state policy seeks to protect. See U.C. SS 73-3a-108(1)(b)(B), (3) (the State Engineer must reject export applications that are inconsistent with Utah's reasonable water conservation policies or objectives). Significant withdrawals of water at this location, which Water Horse admits will not return to the river, Export Application at para. 6, would significantly impact Utah's ability to develop and use its share of water allocated to Utah under the Upper Colorado River Compact.

In addition, Utah is a signatory to the Range-wide Conservation Agreement and Strategy for Roundtail Chub, Bluehead Sucker, and Flannelmouth Sucker (Three Species Agreement), attached as Exh. K. The Conservation Agreement is intended to minimize threats that could lead to listing of these fish species under the Endangered Species Act. It appears that this application could undermine the goals of the Three Species Agreement. The State Engineer should investigate the potential impacts of this proposed project to the Three Species.

Finally, the proposed project could interfere with Utah's ability to meet its obligations, and fully benefit from the water allocated to the state under the Colorado River Compact of 1922 and the Upper Colorado River Compact of 1948. Utah's population is growing and the proposed project may interfere with Utah's ability to develop its share of water allocated under the Colorado River Compact. See UBWRes/UDWR Protest at 1. The proposed points of diversion could also interfere with the use of Flaming Gorge Reservoir pursuant to the Colorado River Storage Project Act, 43 U.S.C. SSSS 620 et seq., to ensure sufficient flows at Lee Ferry, Arizona. The State Engineer should consider this Export Allocation in light of Utah's entitlements and obligations under the Colorado River Compact.

e. The proposed project is economically infeasible (U.C. SS 73-3-8(1)(a)(iii)(A)), and Front Range water suppliers have much cheaper alternative water supplies (U.C. SS 73-3a-108(2)(e), (2)(f)).

Analyses of prior iterations of this project showed that the Flaming Gorge pipeline concept was unaffordable to potential Colorado users when compared to their available alternative sources of supply. See, e.g., Colo. Env't'l Coal. et al. Motion to Intervene and Cmts., FERC Project No. P. 14263-000 (Dec. 15, 2011), attached as Exh. L (attachments to the exhibit not included but available upon request). We doubt that the project's unaffordable cost per acre-foot, or lack of competitiveness with alternative water sources in Colorado, have in any way improved since 2011 with the design changes shown in the Export Application. See also UBWRes/UDWRRes Protest at 2. Nonetheless, if this application is not already rejected on other grounds, this is an important matter for further investigation.

f. Water Horse lacks the financial ability to build its proposed pipeline (U.C. SS 73-3-8(1)(a)(iv)).

Because the project is speculative with no financial commitments from end-users, a small private entity like Water Horse is unlikely to have the financial means to build the proposed pipeline. Once again, it appears that Mr. Million is placing the cart before the horse by trying to obtain a water rights permit as a means to attract financing. FERC rejected this strategy as a justification for granting a permit, see 139 FERC P.31,124 at 8, and the Utah State Engineer should do the same here, U.C. SS 73-3-8(1)(a)(iv) (financial ability to complete the proposed works is a prerequisite to approval of a water right application). If this application is not already rejected on other grounds, the State Engineer should investigate this matter further. See also UBWRes/UDWRes Protest at 3.

#### V. Conditions (U.C. SS 73-3a-108(4))

For all of the above-stated reasons, the Export Application should be denied. Notwithstanding the above-stated reasons for denying the Export Application, any approval should expressly subordinate any export water right to all valid Utah water rights and uses, whether or not approved by the Utah State Engineer at this time.

#### VI. Hearing Requested

For the above-stated reasons, there is sufficient basis currently in the administrative record to reject the application at this time. Nonetheless, should the State Engineer elect to, or be required to, conduct further investigations before rendering a decision, then we request a hearing. See U.A.C. R.655-6-7.

#### CONCLUSION AND REQUEST FOR RELIEF

Wherefore, Western Resource Advocates respectfully requests that the Utah State Engineer DENY the Export Application.

Sincerely,

/s/ Ariel C. Calmes

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